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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GERALD M. FRIEDMAN et al., Plaintiffs and Appellants, v. MILTON SIDLEY et al., Defendants and Respondents.	B145784 (Super. Ct. No. PC023461)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, William A. MacLaughlin, Judge. Judgment reversed with directions. Appeal from the order dismissed.

Richard H. Berger for Plaintiffs and Appellants.

Sidley & Bell and Michael I. Sidley for Defendants and Respondents.

INTRODUCTION

Plaintiffs Gerald M. Friedman, Diane Friedman, Marvin P. Gussman and Madeline Gussman appeal from a judgment in favor of defendants Milton Sidley, Saralyn I. Sidley, Arthur S. Winthrop and Barbara Winthrop as trustees of the Arthur S. Winthrop and Barbara Winthrop Family Trust dated January 17, 1990, the Arthur S. Winthrop and Barbara Winthrop Family Trust dated January 17, 1990, and Ronald B. Siegel. Plaintiffs also appeal from a post-judgment order denying their motions for new trial and to set aside the judgment. We reverse the judgment with directions. We dismiss the appeal from the post-judgment order.

STATEMENT OF FACTS

In 1997, plaintiffs purchased from defendants a commercial building located at 25571-75 Rye Canyon Road in Santa Clarita. During inspection of the building, plaintiffs discovered the roof had leaked. As a result, Paragraph 30 was added to the purchase agreement, providing: "Seller will deliver the Property at the close of escrow with the existing roof in watertight condition with no warranty extending beyond the Close of Escrow. Buyer and Seller shall inspect the Property after the first rain following the Close of Escrow to determine if any roof leaks exist. Seller shall repair any leaks discovered during this inspection at Seller's sole cost and expense unless said roof leaks as the result of Buyer's actions. Completion of said roof repairs shall fulfill Seller's obligations under this Agreement. Other than the above, Seller will deliver the Property in an 'As Is-Where Is' condition at the close of escrow."

The purchase agreement also contained an attorney's fees provision. Paragraph 16.1 provided: "In the event of any litigation or arbitration between the Buyer, Seller, and Broker(s) or any of them, concerning this transaction, the prevailing party shall be entitled to reasonable attorney's fees and costs."

The first rain following the close of escrow was in late September 1997. A number of leaks in the roof were observed. Plaintiffs notified the real estate broker, who notified defendants. Defendants sent over their management supervisor, Ferdinand Soto (Soto), who looked at the roof and said he would take care of it that weekend. No one came to repair the roof that weekend. It rained again, and the leaks continued.

At some point, Soto directed Marcel Palma (Palma) to repair the roof. Palma performed some repairs, said he needed to get more supplies, and left. He never returned.

Plaintiffs again contacted defendants in an effort to get the repairs done. Defendants said they had done all they were going to do.

The leaks continued. Plaintiffs contacted Shane Atkinson (Atkinson), a licensed contractor, in an effort to get the roof repaired. Atkinson came to the property several times and attempted to repair the roof. He was able to repair some of the leaks temporarily, but other leaks he could not repair. Additionally, when he went on the roof to repair the leaks, new leaks would occur due to the dilapidated condition of the roof. He believed that the only cost-effective way to stop the leaks would be to replace the roof. Atkinson did not charge for his services in hopes that he would be given the job of re-roofing the building.

Plaintiffs decided to replace the roof. Atkinson had submitted proposals for a new roof: $79,000 to install a new roof over the existing roof; $110,000 to remove the existing roof and install a new roof. Plaintiffs ultimately accepted a proposal from a different roofer to replace the existing roof with a new foam roof for $202,000.[1]

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[1] The existing roof was a tar roof.

CONTENTIONS

I

Plaintiffs contend that if they were damaged, they would be entitled to a judgment for breach of contract, and the evidence would be insufficient to justify the judgment for defendants.

II

Plaintiffs further contend that they sustained damages of at least $79,000; thus, there is insufficient evidence of lack of damages to justify the judgment in defendants' favor.

III

Plaintiffs assert that if there was sufficient evidence to support the denial of $79,000 or any specific sum in damages, they are entitled to a judgment in their favor for nominal damages.

IV

Plaintiffs additionally assert that the trial court erred in awarding attorney's fees and costs to defendants.

V

Finally, plaintiffs contend the trial court erred in denying their motions for a new trial and to set aside the judgment.

DISCUSSION

This case was tried before the court. Although a statement of decision was not timely requested, the trial court issued an "order for judgment" explaining its decision. The trial court found that "Paragraph 30 required defendants to deliver the property at the close of escrow with the roof in a watertight condition but with no warranties as to the condition of the roof thereafter. Because of the obvious difficulty in determining whether the roof was watertight, the parties agreed that such determination was to be made upon inspection after the first rainfall following the close of escrow and that defendants would be required to repair any leaks discovered at that time, not caused by plaintiffs, at defendants' expense. . . . By its terms, Paragraph 30 required not just the act of repairing but that the repairs actually result in the roof being watertight at the completion of repairs. The contract did not require the repairs to be effective for any period of time after that point in time."

The court found that after the first rainfall following the close of escrow, defendants had repairs made, but "the repairs did not stop all leaks existing at that time." Based on a preponderance of the evidence, the court concluded "the roof was not watertight upon completion of repairs and Paragraph 30 was therefore breached." However, the court added, plaintiffs did "not prove[] what damages resulted from the breach. They eventually replaced the entire roof . . . ." Atkinson testified that the roof could have been repaired, albeit temporarily, so the evidence "was insufficient to establish that a new roof was necessary to comply with the contractual requirement. . . .

Because there was no evidence presented of the cost of making the repairs to stop the leaks, plaintiffs have not satisfied their burden of proof of their damages."

The first question to be answered is whether, upon proof of breach of contract but absent proof of damages, plaintiffs were entitled to a judgment in their favor with at least nominal damages. In support of their contention that they were entitled to a judgment in their favor and at least nominal damages, plaintiffs rely on Civil Code section 3360. It provides: "When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages."

It is generally stated that a cause of action for breach of contract includes a contract, plaintiff's performance or excuse for failure to perform, defendant's breach and damage to plaintiff resulting therefrom. (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 476, p. 570; BAJI No. 10.85.) Based upon this general statement, defendants argue, and the trial court apparently took the position, that failure to prove damages equates to failure to prove the elements of the cause of action, entitling defendants to a judgment in their favor.

Yet the Supreme Court long ago stated that "[f]or the breach of a contract an action lies, though no actual damages be sustained." (*McCarty v. Beach* (1858) 10 Cal. 461, 464.) Based on this principle, it has been held that "[a] plaintiff is entitled to recover nominal damages for a breach of a contract, despite inability to show that actual damage was inflicted upon him, [citation], since the defendant's failure to perform a contractual duty is, in itself, a legal wrong that is fully distinct from the actual damages. The maxim that the law will not be concerned with trifles does not, ordinarily, apply to violation of a contractual right. [Citation.] Accordingly, nominal damages, which are presumed as a matter of law to stem merely from the breach of a contract [citation], may properly be awarded for the violation of such a right. [Citation.]" (*Sweet v. Johnson* (1959) 169 Cal.App.2d 630, 632-633; accord, *Xebec Development Partners, Ltd. v. National Union Fire Ins. Co.* (1993) 12 Cal.App.4th 501, 576; *Sill Properties, Inc. v. CMAG, Inc.* (1963) 219 Cal.App.2d 42, 55.) This rule is set forth in Civil Code section 3360. (*Sweet*, *supra,*

at p. 633; accord, *Capell Associates, Inc. v. Central Valley Security Co.* (1968) 260 Cal.App.2d 773, 785.)

In *Bromberg v. Signal Gasoline Corp.* (1933) 130 Cal.App. 469, "the plaintiff . . . failed and refused to prove . . . the only damages which it was entitled to recover in the action." (At p. 471.) Based on that failure, the court held that "a judgment for nominal damages only was all that the trial court was authorized to render in its behalf." (*Ibid.*) The court explained, "In general, where in an action for breach of contract no evidence has been offered regarding the amount of damages sustained by the plaintiff in the action," the law is that: "'. . .where a legal wrong is established but there is no evidence as to actual damages nominal damages are properly awarded. In other words, where plaintiff establishes a cause of action but fails to show any damage he may recover nominal damages.'" (*Id.* at pp. 471-472.)

The situation here is the same as that in *Bromberg*. Plaintiffs proved a breach of contract but "failed and refused to prove . . . the only damages which [they were] entitled to recover in the action" (*Bromberg v. Signal Gasoline Corp.*, *supra*, 130 Cal.App. at p. 471), the cost of repairs to the roof. Based on the authorities cited above, we conclude plaintiffs were, in fact, entitled to a judgment in their favor and an award of nominal damages. (*Id.* at pp. 471-472; accord, *Xebec Development Partners, Ltd. v. National Union Fire Ins. Co.*, *supra*, 12 Cal.App.4th at p. 576; *Sweet v. Johnson*, *supra*, 169 Cal.App.2d at pp. 632-633.) Therefore, the judgment must be reversed.

Plaintiffs assert they presented evidence of damages of at least $79,000, the lowest estimate they received for a new roof. As plaintiffs point out, the measure of damages for a breach of contract "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby." (Civ. Code, § 3300.) That is, contract damages should be an amount which "serve[s] to put the party in as good a position as it would have been had performance been rendered as promised." (*State of California v. Pacific Indemnity Co.* (1998) 63 Cal.App.4th 1535, 1551.)

Under Paragraph 30, however, plaintiffs were not entitled to a new roof. They were entitled only to have the roof repaired so that it was "watertight at the completion of repairs. The contract did not require the repairs to be effective for any period of time after that point in time." Thus, the cost of a new roof was not the appropriate measure of damages. (Civ. Code, § 3300; *State of California v. Pacific Indemnity Co.*, *supra,* 63 Cal.App.4th at p. 1551.)

Plaintiffs presented no evidence that they incurred any expenses in repairing the roof. They presented no evidence of the cost of repairing the roof to make it temporarily watertight, although they presented evidence such repairs were possible. Accordingly, substantial evidence supports the trial court's determination (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1229) that plaintiffs did "not prove[] what damages resulted from the breach."

There remains the question of attorney's fees and costs. Paragraph 16.1 provided for an award of reasonable attorney's fees and costs to the prevailing party in the event of litigation over the sale of the property. Code of Civil Procedure section 1032 defines "prevailing party" to include "the party with a net monetary recovery." (Subd. (a)(4).) This may include a party recovering nominal damages. (See *Sweet v. Johnson*, *supra*, 169 Cal.App.2d at pp. 633-634.) Accordingly, we must remand the case to allow the trial court to reconsider the question of attorney's fees and costs.[2]

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[2] In light of the conclusions reached above, we need not consider whether the trial court erred in denying plaintiffs' motions for a new trial and to set aside the judgment. The appeal from the order denying the motions is moot.

The judgment is reversed and the case remanded with directions to enter a judgment in plaintiffs' favor, to make an award of nominal damages in their favor and to reconsider the question of attorney's fees and costs. The appeal from the order denying plaintiffs' motions for a new trial and to set aside the judgment is dismissed. Plaintiffs are to recover their costs on appeal.

NOT TO BE PUBLISHED

SPENCER, P.J.

We concur:

ORTEGA, J.

MALLANO, J.